



"Promoting consumer
choice and innovation
through advanced
facilities-based networks."

BRINGING FULLY COMPETITIVE BROADBAND TO AMERICA¹

FILED ELECTRONICALLY

August 18, 2008

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of Written *Ex Parte* Presentation MB Docket Number 07-198

Dear Ms. Dortch:

We respectfully submit this written *ex parte* to supplement the record in this proceeding reviewing the Commission's program access rules and examining programming tying arrangements. The FCC's inquiry into the relationship between video programmers and distributors is appropriate and has the opportunity to foster greater consumer choice and competition among Multichannel Video Programming Distributors (MVPDs).² The Broadband Service Providers Association (BSPA) submits this *ex parte* in support of the Wholesale Untying regulations as proposed by the American Cable Association (ACA) in this proceeding. When the largest video programmers use their market power to charge ever-increasing rates and thwart choice at the wholesale level, MVPDs have less flexibility to meet consumer desires and compete with each other. Consumers ultimately pay the price.

The BSPA and its member companies have consistently fought for program access rules that will create a more competitive market and increase the availability of affordable diverse programming for consumers. The BSPA has already advocated the following policy positions in this proceeding.

¹ The current members of BSPA, all of which are last-mile, facilities-based providers, are: Hiawatha Broadband, Knology, RCN, and SureWest Communications. BSPA is located at 1601 K Street NW, Washington, DC 20006. Phone: 202.661.3945

² Federal Communications Commission. *Report and Order and Notice of Proposed Rulemaking, Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 17791, 17862-67 (2007).

1. Close the terrestrial loophole.
2. No early sunset for the prohibitions on exclusive contracts.
3. A stay for pre-existing carriage during a complaint proceeding.
4. FCC managed Arbitration as a remedy for pricing disputes.

In addition to these policy positions the BSPA has consistently sought policies and market conditions that would provide for greater flexibility in how MVPDs package and offer content to customers so long as these policies did not create mandated retail a la carte or price regulation. This desired flexibility to offer greater consumer choice has been greatly constrained by the historical structure of the expanded analog programming packages. This structure has been driven by technology and contract constraints to become the dominant most widely distributed programming packages with the greatest historical economic value. The pending DTV transition will be a major step toward taking the industry to operating with all digital networks. This, in turn, will provide the technical ability to repackage content to meet consumer desires for more choice, control, and lower prices. Expanded consumer choice should be one of the expected benefits of the transition to all digital carriage but this opportunity would be constrained or even blocked if there are no changes in the wholesale contracts that have driven the current profile of analog carriage.

The ACA proposals are designed to assure that MVPDs have reasonable access to individual channels without constraining the ability of programmers to also offer bundled channels. This will create an environment that will allow MVPDs the opportunity to take advantage of the all-digital networks we are operating or developing. We agree with arguments offered in this proceeding that bundled programming has significant economic value. We have also experienced the abuse of market power by major programmers when bundles are offered in ways that virtually eliminate any other carriage options that would be the preference of

customers served by that MVPD. The solution is not to eliminate the bundles but provide assurance that fair and reasonable alternate carriage is also available.

As an addition to the ACA proposals the BSPA also advocates use of FCC Arbitration for the remedy phase of any complaint related to these new Wholesale Untying rules. The details of the proposed FCC Arbitration were provided in the BSPA's original comments filed in this proceeding. We assert that adoption of an arbitration process for the pricing remedy phase of a complaint proceeding is the best option to resolve the dispute without creating a path or precedent for FCC price regulation. Arbitration implemented as part of the Adelphia Decision has been proven to be an effective process that has incited all parties to find commercial resolution for pricing disputes whenever possible. The FCC Arbitration process as outlined by the BSPA takes advantage of the benefits of Arbitration without creating any issues of using arbitration as a shortcut to gain bargaining power for price negotiation. FCC Arbitration would only be implemented after a full complaint proceeding had determined that there was a legitimate case that required resolution.

We urge the Commission to act promptly on this item. Every day that goes by means that MVPDs are forced to enter into new or renewed contracts that are inconsistent with the important consumer goals that the ACA proposal would address. Indeed, it seems that in anticipation of possible Commission action, programmers have actually stepped up their efforts to lock in long term contracts and to tie undesirable programming to important HD programming that consumers will expect to be able to view on their new HDTVs.

At least one of BSPA's members has started to request change of law provisions in its pending programming and retransmission agreements that provide that the parties will renegotiate them to comply with any Commission decision in this

docket. To date, however, the answer to such requests from major ‘must-have’ sports and other programmers has been a resounding *No!*, with no discussion or good faith effort to negotiate whatsoever. Therefore, unless the Commission is prepared to apply the decision to existing contracts, any delay in a decision in this proceeding will mean that consumers are denied the benefits of the Commission’s order during the term of such contracts. Thus, for example, the un-tying of retransmission obligations would likely be delayed by 3 years until the next retransmission window opens. Accordingly, we urge that the Commission adopt the proposal as soon as possible so that new and renewed contracts can start to be in conformance with the important goals of un-tying and un-bundling the restrictions that currently exist.

The BSPA therefore endorses the ACA proposals for Wholesale Untying combined with the BSPA proposal for FCC Arbitration as the remedy for pricing issues in a carriage complaint proceeding.

Respectfully submitted for,

Broadband Service Providers Association

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